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In the Supreme Court of the United States

OCTOBER TERM, 1972

~~72-904~~

MARK KROLL,

Petitioner,

VS.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

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In the Supreme Court of the United States

OCTOBER TERM, 1972

NO.

MARK KROLL,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

Petitioner prays that a writ of certiorari be issued to review the judgment of the Appellate Court of Illinois, First Judicial District, entered in this cause on February 25, 1972, affirming Petitioner's conviction in the Circuit Court of Cook County.

OPINION BELOW

The opinion of the Appellate Court is reported at 4 Ill. App.3d 203, 280 N.E.2d 528 (1972), and is reprinted herein as Appendix A.

JURISDICTION

The judgment of the Appellate Court (Appendix B, *infra*) was entered on February 25, 1972. A timely Petition for Rehearing was denied on March 28, 1972. (Appendix C, *infra*) An extension of time within which to file a Petition for Leave to Appeal the judgment of the Appellate Court to the Illinois Supreme Court was granted on May 18, 1972. (Appendix D, *infra*) A petition for Leave to Appeal was timely filed, and was denied by the Illinois Supreme Court on September 28, 1972. (Appendix E, *infra*) This Petition is filed within ninety days of the final order of the Illinois Supreme Court denying leave to appeal. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

I. Is it a violation of a state criminal defendant's constitutional right to due process of law and confrontation of witnesses for a prosecutor in his arguments to the judge sitting as the trier of fact to make repeated material factual assertions which are totally unsupported by evidence; is it a further violation of these rights for the trial judge to expressly rely upon these assertions in reaching his verdict of guilty?

II. Is it a violation of a state criminal defendant's privilege against self incrimination and a denial of due process of law for a prosecutor during arguments to the trial judge sitting as the trier of fact to repeatedly comment upon the defendant's failure to take the witness stand; is it a further

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violation of the same constitutional rights for the trial judge to expressly consider the defendant's failure to testify in reaching his verdict of guilty?

III. Is a state criminal defendant deprived of his constitutional rights to due process of law and confrontation of witnesses when the state selectively removes the court reporter from the grand jury room during the testimony of crucial prosecution witnesses before that body for the purpose and with the result of limiting cross-examination of those witnesses at trial?

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> * * * nor shall [any person] be compelled in any criminal case to be a witness against himself * * *.

2. The Sixth Amendment provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *.

3. The Fourteenth Amendment provides, in pertinent part:

> * * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * *.

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STATEMENT OF THE CASE

Petitioner Mark Kroll was charged with twenty-four counts of theft of property of a value in excess of $150.00,[1] and with three counts of conspiracy to commit theft.[2] Kroll waived a jury and was tried by the Court in the Circuit Court of Cook County, Judge Reginald J. Holzer, presiding. The theft charges were dismissed at the close of the State's evidence. After defense and rebuttal evidence, Kroll was found guilty of the three conspiracy counts and sentenced to a term of not less than one year, nor more than three years, in the Illinois State Penitentiary.

Evidence

The indictment charged that Petitioner and one Harold Peck engaged in a scheme to drain Oxford General Mutual Casualty Insurance Company (hereinafter referred to as Oxford General) of substantial sums of money and commercial paper over a period of several years by causing payments to be made to a number of financial entities allegedly controlled by Kroll and Peck.

Prosecutors' Assertion and Court's Consideration of Matters Not in Evidence and of Petitioner's Failure to Testify

It was the State's theory at trial that Mark Kroll — not himself an officer of Oxford General — had manipulated

[1] In violation of Illinois Revised Statutes, ch. 38, par. 16-1 (1963).

[2] In violation of Illinois Revised Statutes, ch. 38, par. 8-2 (1963).

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Harold Peck,[3] Raymond Wernke[4] and William Jones[5] to

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[3] Harold Peck met Mark Kroll in May or June of 1958. (A. 127) ((A. .....) references are to the Abstract of Record filed by Petitioner in the Appellate Court of Illinois, cause No. 53639.) In 1960 he performed brief services for Kroll's wholly-owned company, Wilmark Insurance Agency, and then worked for two corporations headed by Kroll: National Leasing Corporation and Insurance Corporation of America. (A. 154-55) Peck described his duties during 1960 and 1961 as acting as Kroll's agent, selling securities for him, raising funds, and helping in all possible ways, including looking for insurance companies for Kroll to buy. (A. 131) In late 1961 Kroll suggested Peck look for other employment, as Kroll was having difficulty paying him. (A. 131) In August of 1962, at Kroll's request, Peck became chairman of the board of Guaranty Financial Corporation, the company which eventually held control of Oxford General. (A. 60, 132) Peck testified that he disassociated himself from Kroll in late September, 1963, after he accused Kroll of taking money from Oxford General and not returning it. (A. 150-151)

During cross-examination, Peck said he did not conspire with Kroll to steal funds from Oxford General, nor did he steal any money from that company (A. 149) He said, "I am not a thief." (A. 150) Earlier in the trial, one of the prosecutors, Mr. Lynch, had said, "The State has never said, Judge, that Harold Peck is anything but a thief or a conspirator." (A. 104)

Peck testified no one made any promises in return for his testimony against Kroll, (A. 207) but that his hope, based in part on the giving of testimony, was in the direction that the State would dismiss the charges against him. (A. 208)

[4] Raymond Wernke was employed in April, 1959, by Kroll's Agency Corporation of America. From July, 1960, until September, 1963, he was treasurer of a number of Kroll's companies — Wilmark, Agency Corporation, and Mark Kroll Enterprises, handling the books and records of each. (A. 42-43) From time to time he worked on the books and records of Oxford General and its related companies. (A. 53, 92)

[5] William L. Jones was an accountant who worked for and became treasurer of several Kroll companies in 1963. (A. 268) In setting

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effect the draining of Oxford General's assets. Each of the three testified on behalf of the State to conversations and transactions introduced to show that Kroll directed the draining process.

In ruling on Mark Kroll's motion for a judgment of acquittal at the close of the State's evidence, Judge Holzer observed of these three men "[the] State's position is established by way of the lengthy testimony of three theme witnesses. Without them the State has nothing." (A. 329)

The Court characterized Peck's testimony as "suspect for perjury," and "singularly consistent in its evasiveness." (A. 329-330)

Ray Wernke, the Court said, "had reason to color his testimony and do what he could to join Peck in hanging the albatross around Kroll's neck." (A. 330)

The Court referred to Jones as "a quiet tool," and "sort of a monkey who saw evil and heard evil but spoke no evil until subpoenaed." (A. 330, 331)

(Footnote Continued)
up corporate bank accounts, he submitted certified corporate resolutions signed by him which he knew falsely stated that duly-called meetings of a board of directors had been held. (A. 314) While keeping the books of Oxford General, he made some improper accounting entries, which he did not question at the time he made them. (A. 266) Ray Wernke would help him with the books of Oxford General and Oxford Financial Corporation, and it was Wernke who explained to him how to treat an accounts receivable in the insurance industry. (A. 237, 88, 265) Such an entry, he was told, had to be substantiated; it could not be an open loan or an open advance. (A. 265) He testified that he had been appointed to his positions by Kroll, and he resigned his various positions at the end of 1963 by submitting letters of resignation to Harold Peck. (A. 268, 306)

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The defense's theory of the case was that Mark Kroll was simply not connected to the process by which Oxford General was victimized. It contended that the three key State witnesses were the real perpetrators of this crime and that they were now trying to shift the blame onto the defendant.

The sole defense witness was Mr. Thomas Harris.[6]

In direct contrast to the testimony of Peck, Wernke and Jones, Harris testified to numerous conversations and transactions which tended to show that they — and not Mark Kroll — were running the various financial entities under investigation, and causing the drain of Oxford General assets into those entities. He also testified to statements by Peck expressing plans to "cover his Oxford problem by blaming it on Kroll," and to "bury Kroll with it." (A. 340)

Harris testified that in mid-September, 1963, Peck told Harris that he had discontinued his consulting arrangement with Kroll, and that Kroll was not to be given any information about the business. Kroll called shortly thereafter, and Harris told him he could not have any information. Kroll did not call again. (A. 338)

When Harris was asked about the conversation with Kroll, the State objected, saying, "If the defendant wants to take the stand and testify to it that is another thing." (A. 339)

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[6] In 1963 Mr. Harris was vice president of Oxford General, (A. 337) North American Underwriters, (A. 338, 351) (an agency set up in Miami to sell insurance for Oxford General), and Agency Management Corporation. (A. 342)

Harris had known Kroll and Peck since 1960, when he had worked for Insurance Corporation of America. He left ICA in November 1961, and went to Florida. (A. 336)

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A defense objection and motions to strike and for mistrial were overruled. (A. 339)

Upon completion of Harris' direct examination, one of the prosecutors moved in the witness' presence that he be "sequestered" by the Sheriff of Cook County. (A. 342)

The defense then renewed its motion for a mistrial, citing the prosecutor's motion to sequester Harris and the remark about the defendant taking the witness stand. (A. 342)

Responding to that defense motion, the prosecutor, again referring to Harris' testimony about the conversation with Kroll, said, "It is self-serving and if the defendant wants to take the stand and testify to it, that's another thing and we can cross-examine him." (A. 343)

When the defense suggested the State's motion to sequester Harris had a coercive impact on the witness, the prosecutor informed the Court, "Mr. Gertie from our office went to Florida to serve the subpoena in question . . . it was the opinion of the law enforcement people that Mr. Harris was evading subpoenas at that time." He also said a Florida prosecutor "informed our office that they were going to Court . . . I believe this week . . . to hold Mr. Harris in contempt for failure to produce corporate books and records pursuant to a subpoena duces tecum . . . And he was sequestering himself. We couldn't find him." (A. 343)

The defense again moved for a mistrial. The Court reserved its ruling. (A. 343)

During the course of Harris' cross-examination, one of the prosecutors responded to objections of the defense by saying:

"Our position is this, Judge; the witness disclaims or did disclaim on direct examination any close relationship

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or any knowledge of a close relationship with Mark Kroll, with North American Underwriters, and we intend to prove that this man for some four to five years lived in Mr. Kroll's house in Miami, that he paid Mr. Kroll the monthly rent, paid it at one time out of the funds of North American Underwriters, subsequently out of the funds of another insurance company that he became associated with, thereby showing an affinity of the closest type between this witness and Mr. Kroll." (A. 345-346)

• • •

"Your Honor, the facts will show as we continue on with this cross-examination that Mr. Thomas Harris is an accomplice in this case . . . This man was employed by a for-profit organization called North American Underwriters and yet received many thousands of dollars from Oxford General Insurance Company through the defalcator himself. . . ." (A. 346)

That comment brought a motion for a mistrial. (A. 346)

• • •

". . . And we are beginning an area of cross-examination here which I will seek to go into deeper at a later time today, which will be directed strictly to that, to show the interest and bias on the part of this witness, and to clarify for His Honor the continuing relationship between Mr. Mark Kroll and this witness up to a period of the present time." (A. 352-353)

• • •

"Your Honor, we are developing a very important line of questioning here that is going to show that this man in fact has diverted funds on behalf of Mr. Kroll in these — in this specific company and in other companies, and which we will show the relationship that this witness bears to Mr.

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Kroll, that he has in fact disbursed funds at the behest of Mr. Kroll, on behalf of Mr. Kroll, paid certain bills, substantial bills for Mr. Kroll during a period of time from 1963 until the present . . . and the relationship of this man as a person who directs the payment of Mr. Kroll's personal bills from NAU and other companies." (A. 353-354)

• •

". . . the State will show that Mr. David Walters represented Mr. Kroll in a cause of action, that these checks [People's Exh's C, D, and E.] were paid as his legal fees in that cause of action. . . ." (A. 354)

Harris' testimony was that he lived in a North Miami home in the early Spring of 1963, after NAU was formed. He said Peck told him the house was available. When asked if Peck said he was acting in Kroll's behalf, Harris answered, "He did not." (A. 346)

Rent for the house was paid to Calico Farms. Harris did not know who owned Calico Farms. (A. 344) The prosecutor asked: "If Mr. Kroll were to state that he or his wife owned Calico Farms, would that be a true statement?" (A. 346) The defense objected, renewing its motion for a mistrial. When the prosecutor referred to Harris as an "accomplice," the defense again moved for a mistrial. Judge Holzer took under consideration the mistrial motion. (A. 346)

Rent payments for the North Miami home came from NAU. Harris could not recall making out the checks, although the signature on one of them appeared to be his. (A. 347) His former wife lived in the home at the time of trial. (A. 347)

In 1963, Harris received salary checks drawn on Oxford General. They represented his salary as vice president of Oxford General and NAU. (A. 351)

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During 1963, NAU issued some checks to Wilmark, Kroll's company. Harris did not know if the checks were issued before or after the conversation with Kroll. Nor did seeing the checks refresh his recollection about the exact date of the conversation where Peck offered Harris "a piece of the action." (A. 356)

Harris testified at no time in 1963 or 1964 did he pay out NAU money at Kroll's request, nor did he order anyone to do so. (A. 353) He was asked: "Mr. Harris, from May of 1963 and until today, have you ever paid any bills for Mr. Kroll?" He answered, "No." (A. 354)

After saying he never caused any bills to be paid for Kroll in any way, Harris was asked by the prosecutor: "Did you ever pay Mr. Kroll's attorneys' fees, or cause them to be paid?" He answered, "No." (A. 354)

The State attempted to introduce checks signed by M. K. Harris on the American Equity Underwriters bank account made payable to one David W. Walters. Thomas Harris was president of American Equity. (A. 347) The defense objected. (A. 354)

When the prosecutor said the evidence would show Walters represented Kroll in a cause of action, the checks being issued by Harris for Kroll, the Court said: "Of course, at this time we don't know that these were paid in his behalf. But I assume you will be able to prove that." (A. 354, 355)

Harris then was asked if David W. Walters was an attorney in Miami. His answer was "yes." (A. 355) That was the extent of Harris' testimony about Walters and the issuance of People's Exhibits C, D, and E.

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Before Harris left the stand, the State sought to introduce the affidavit of John Gertie, an assistant state's attorney. The prosecutor said the affidavit was in support of the "representations made on the record, outlining the difficulty we had in locating him." (A. 357) The offer was refused.

The defense then rested. (A. 357)

The prosecutor told the Court he expected to put on one, perhaps two, rebuttal witnesses. One of them, he said, is a United States Attorney. (A. 358)

The first rebuttal witness was William Jones. He said he did not receive a long distance phone call from Harris in July, August, or September of 1964, nor did he call Harris from July through September, 1964. (A. 358)

The United States Attorney which the prosecutor referred to was Michael J. Osman, the State's final witness. His testimony was:

I have been an attorney for about five years. I know Mark Kroll. I first met Kroll in November of 1966. (A. 358) I first met Mark Kroll at the United States Courthouse, 300 East First Avenue, Miami, Florida. (A. 359) I know a person by the name of David W. Walters. He is an attorney. He belongs to a law firm by the name of Walters, Moore and Cotanzo. (A. 359) He belonged to that law firm in December of 1966. (A. 360) I have examined People's Exhibits C, D, and E. (A. 361)

The questions to which objections were sustained were:

"Did he [David W. Walters], in fact, represent Mark Kroll?" (A. 359)

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"In 1966 did—on August 23rd of 1966, did David W. Walters represent the defendant, Mark Kroll?" (A. 360)

Responding to defense objections, the prosecutor made these statements:

" . . . if we are allowed to offer proof we will prove that the witness, Harris, did cause to be paid Mr. Kroll's attorney's fees in 1966 and 1967 in a certain cause of action pending in the United States District Court in Dade County, Florida." (A. 359)

The defendant moved for a mistrial. (A. 359)

"Your Honor, if this witness, Mr. Osman, were permitted to testify he would testify that he represented a certain plaintiff in a cause of action in Florida, that cause of action starting February 15, 1966, and culminating on March 7th, 1967, that Mr. Kroll was a defendant in that cause of action, that Mr. Kroll was continuously represented by David W. Walters. . . ." (A. 360)

• • •

"Now we can establish through this witness that at the time that the three checks were issued from Harris' company, American Equity Underwriters, that Kroll, in effect, was represented by David W. Walters, and that, as a matter of fact, for a portion — let's say at time these instruments were issued that I believe —" (A. 361)

• • •

Another prosecutor added his opinion: ". . . But I certainly think, when checks totalling $21,000 go to a man who purportedly represented the defendant at that time, I certainly think that's something that the Court can take into consideration, if it so desires. . . ." (A. 361)

The defendant's motion to strike Michael J. Osman's testimony was denied, but the Court refused to admit into

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evidence People's Exhibits C, D, and E, the checks the prosecutors said went from American Equity Underwriters to attorney David W. Walters. (A. 361)

Judge Holzer denied the defendant's several motions for a mistrial. (A. 368)

Before finding Kroll guilty of the conspiracy counts, Judge Holzer read this opinion from the bench:

"On March 11th, 1968, after hearing lengthy argument from both sides, the court ruled on defendant's motion for judgment of acquittal at the end of the State's case. At that time the court rendered an opinion evaluating the testimony of the State's three key witnesses, Messrs. Peck, Wernke and Jones. The court at that time also made findings of fact, in connection with that testimony and other evidence presented by the State. At that time the court sustained a motion for judgment of acquittal with regard to the grand theft counts but denied as to the three conspiracy counts, 74, 76 and 78.

"It is now the duty of the court to render a verdict, after having heard, read and re-read all of the five thousand seventy-six pages of transcript plus more than 400 documentary exhibits which constitute the evidence, after having evaluated the candor and conduct (A. 362) of the witnesses on the stand and after having given both sides an opportunity to make final arguments.

"In an effort to discourage repetition and to avoid further burdening an already ponderous record, this court will now adopt as part of this opinion the findings of fact and conclusions of law contained in the court's said opinion of March 11th, 1968.

"Only one witness has testified for the defense. He was Thomas Harris, a former vice president of the Oxford

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General Casualty Mutual Insurance Company, the alleged victim in this case. He also was an officer of North American Underwriters, a corporation that played a major role in the operation of Oxford General.

"Harris' testimony was in direct conflict with much of the material evidence presented by the State through the witnesses Peck, Wernke and Jones. In some instances, Harris testified to events which, if taken at face value, would do serious damage to the veracity of the State's three major witnesses. Harris testified that it was Peck who held himself out as the man who owned and operated Oxford General, it was Peck who hired him, who set his salary, who dictated where he would live and what his duties would be.

"Harris testified to several conversations with Peck, each damaging to the State's case. In Chicago, during the talks with the Highway Insurance Company, Peck, according to Harris, told Harris that, "I'm the boss, you are working for me." Harris also stated that another conversation took place in late summer of 1963, when Peck told Harris the arrangement (A. 363) with Mark Kroll and North American Underwriters had been discontinued, but Harris was not to give Kroll any information should Kroll call. And Harris further testified that, in fact, Kroll did call and that he, Harris, followed Peck's instructions and gave Kroll no information.

"The conversation perhaps most damaging to the State's case was said by Harris to have taken place in December of 1963. At that time Peck told Harris that Oxford was in a dangerous position; that he, Peck was planning to get into another company to cover Oxford's problems and that Peck would one day bury Kroll. Peck, according to Harris, said he had promised Wernke and Jones a piece

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of the action for going along in the burial of Kroll. The "bury Kroll" phrase was said by Harris to have been repeated by Peck in the late summer or early fall of 1964, when Peck asked for a loan.

"On another occasion, according to Harris, Peck told of making Harris an officer of Agency Management Corporation, another company playing a key role in this case. Peck earlier had testified that he had nothing to do with this company.

"It's worth noting that the State did not see fit to recall Peck as a rebuttal witness, although, presumably, the prosecution could have done so if it wished. Thus Harris' testimony about his conversations with Harold Peck stands unrebutted. Also unrebutted by the State is Harris' testimony about his conversations with Wernke. In January of 1964, according to Harris, Wernke said he and Peck had acquired Home & Auto Insurance Company to replace Oxford General. Harris also testified that Wernke was present in Chicago, in March of 1963 (A. 364), during Oxford's negotiations with the Highway Insurance Company for a re-insurance agreement in Florida. At one of those conversations, Peck is said to have described Mark Kroll's interest in a deal, a five percent consulting commission.

"Harris also testified that the State's third key witness, William Jones, was present in Chicago for much of the negotiations between Oxford and Highway. Harris said he saw Jones again in November of 1963 in Florida, when Jones told him Peck had sent him down to work on North American Underwriters' books.

"His next contact with Jones, according to Harris, was August of 1964, when Jones said in a phone conversation that he had told the State's Attorney that it was Peck

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who had authorized issuance of certain Oxford General checks. Jones also was said to have told Harris that he would do whatever was necessary to protect himself.

"Harris testified to one other event that contradicts the State's evidence. He said he was part of the negotiations for the purchase of certain furniture for the NAU offices in Florida and that Kroll was never consulted and had nothing to do with the purchase. He said he consulted Harold Peck about payment of the $6400 for the furniture. That was the only testimony for the defense.

"In rebuttal, the State presented William Jones and an attorney from Miami, Florida, Michael Osman, O-s-m-a-n.

"The Court in its opinion at the end of the State's case, evaluated the credibility of the witnesses Peck, Wernke and Jones. It must now evaluate the witness Harris, to determine whether any bias, interest or (A. 365) influence affected his testimony. If it did not, thus requiring the court to accept his unrebutted direct examination and untarnished proof, the State's case would fall.

"But for the following reasons the court finds it cannot place its complete reliance on the credibility of Harris. The court finds Harris is not the disinterested witness he presents himself to be. For several years until a few days before this trial began, Harris lived in a Florida house owned by Mrs. Mark Kroll. Rent for that house was paid by North American Underwriters. The evidence indicates there was a continuing relationship between Kroll and Harris, during the years between the folding of Oxford General and the beginning of this trial. During that time, Harris was president of a firm named American Equity Underwriters. It was developed, during cross examination of Harris, that he, through that firm, paid or caused to be paid $22,500 to an attorney named David Walters.

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"At about that same time, Kroll was a defendant in a Florida trial in which Attorney Osman represented the plaintiff, presumably the Government and Kroll was represented in that proceeding by Attorney Walters. The court feels that it is free to conclude from these facts that a relationship did in fact exist between Kroll and Harris. Additional evidence of relationship between Harris and Kroll is contained in the checks from North American Underwriters to Kroll's Wilmark Insurance Agency. Each issued from Harris' company after the date Harris was instructed by Peck to have nothing further to do with Kroll (A. 366).

"It should further be noted that while Harris was not subpoenaed by the defense in this cause, the State found him to be a difficult witness, at best, for locating. It appears that Harris was even attempting to evade process and that, in fact, some kind of contempt proceedings had been planned by Florida authorities.

"The court must observe that the only witness presented by the defense, Harris, did not and could not testify to any of the overt acts alleged in the conspiracy counts, in Paragraphs Number 4 through 9, each of which this court found to have been proven at the end of the State's case. The only person who could have testified about those transactions for the defense has been in this courtroom since the trial began. Despite the fact that the court has reason to conclude that he is a court room veteran, he did not take the stand. This was his choice, and the court, of course, does not hold it against him.

"This has not been an easy case to decide. The volumes of evidence heard by this court are capable of contradictory interpretation. This, in common parlance, is a close case. The testimony of each of the State's three star witnesses contains many inherent improbabilities. And, in

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the case of one of them, Peck, much that is incredible. Each of the three had some kind of vital interest in his testimony, each was closely allied with the systematic taking of money from Oxford General; but the court must also consider that Harris, too, was shown to be less than a disinterested witness, when it comes to the welfare of Mark Kroll. (A. 367)

"The evidence of bias and interest on the part of Harris plus the defense's failure to present denial testimony, which only it could offer, leads this court to the conclusion that it must resolve the issues in this case in favor of the prosecution. Accordingly, Mark Kroll is found to be guilty of conspiracy as charged in this indictment." (A. 368)

Decision Below

Petitioner sought relief in the Illinois Appellate Court from the denial of his Sixth Amendment right of confrontation and Fourteenth Amendment right to due process which resulted from the unsupported assertions of fact by the prosecutor and the Court's reliance thereon in reaching his verdict. He also raised the deprivation of due process and violation of his privilege against self-incrimination which resulted from the prosecutors' comments on his failure to testify, and the Court's reliance thereon.

The Appellate Court held first, that ". . . even if the trial court erred in stating his reasons for finding Harris a biased witness, this error had no significance and did not result in prejudice to the defendant" because the testimony of Harris left the State's evidence as to at least one of the overt acts in each conspiracy count unblemished. (App. A. p. 7, *infra*). The Court also found support in the fact that Harris "did not and could not testify as to either the many business office meetings at which the agreement to commit theft was arrived at or the extensive documentation inferentially supporting the conspiracy theory." (App. A, p. 5, *infra*)

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Secondly, the Appellate Court held that the prosecutor's comments on Petitioner's failure to testify were merely proper argumentative responses to defense objections, and that the trial Court in delivering its opinion made clear that it had not relied on the defendant's silence in reaching its verdict, but was merely commenting in a permissible and non-prejudicial manner on the uncontradicted nature of the State's case. (App. A. p. 9, *infra*).

Prosecutor's Selectively Removing the Court Reporter from the Grand Jury Room During Testimony of Certain Witnesses

The State did not use a court reporter to transcribe the testimony of Jones and Wernke when they appeared before the August, 1964 Special Grand Jury that heard the Oxford General evidence. Defendant's Exhibit 311 established that a court reporter was present for the testimony of 14 witnesses, but not present for the testimony of six court reporters, three assistant state's attorneys, Jones and Wernke. (A. 326) Harold Peck did not testify before the Grand Jury. (A. 149)

There were six court reporters working for the State's Attorney's office at the time (A. 325). At least four court reporters transcribed Mark Kroll's testimony when he appeared before the Grand Jury (A. 325).

When questioned by the trial judge about the absence of a court reporter during Wernke's grand jury testimony, one prosecutor said, "We use it [court reporter] under the individual's judgment, the person presenting the matter" (A. 50), and another added, "I think, Judge, where we had witnesses we felt we had a problem with perjury, or something like that, we'd take transcripts. But, as a general rule, I don't think we did have." (A. 50) And, again: ". . . it was up to the judgment of the individual State's Attorney assigned to the case as to whether or

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not this witness would be reliable to repeat his story, and not for any ulterior motives or any other opinions expressed by [defense counsel] Mr. Busch." (A. 63)

The defense claimed that the picking and choosing of those witnesses whose grand jury testimony would be transcribed deprived the defendant of his Sixth Amendment right to cross examine and his Fourteenth Amendment right to due process of law (A. 58, 126). At the end of Ray Wernke's testimony, again at the end of William Jones' testimony, and on several other occasions during the prosecution's case-in-chief, the defense accordingly moved to strike the direct testimony of the witnesses Wernke and Jones. (A. 58, 126, 257, 316, 324).

The trial judge denied the motions to strike, noting that Illinois case and statutory law did not require the reporting of testimony before a grand jury (A. 64, 156, 325), although, he said, "fair play" would require the presence of court reporters in all grand jury hearings (A. 325).

Decision Below

Petitioner raised in the Appellate Court his claim that the selective removal of the grand jury reporter denied him effective cross examination and confrontation at trial, guaranteed by the Sixth Amendment, as well as due process of law guaranteed by the Fourteenth Amendment. That Court held that the issue had been decided adversely to Petitioner in *People* v. *Colletti*, 101 Ill.App.2d 51, 242 N.E.2d 63, *cert. den.* 396 U.S. 927, in which it had been held that due process of law did not impose upon the State a duty to insure that testimony of all witnesses before the grand jury be recorded as a matter of course.

All constitutional claims raised in this Petition were urged upon the Illinois Supreme Court in Petitioner's Petition for Leave to Appeal, which was denied without written opinion on September 28, 1972. (App. E, *infra*)

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REASONS FOR GRANTING THE WRIT

I.

PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND CONFRONTATION OF WITNESSES WHEN THE PROSECUTORS IN THEIR ARGUMENTS TO THE TRIAL JUDGE SITTING AS THE TRIER OF FACT MADE REPEATED MATERIAL FACTUAL ASSERTIONS WHICH WERE TOTALLY UNSUPPORTED BY EVIDENCE; HE WAS FURTHER DEPRIVED OF THESE SAME RIGHTS WHEN THE JUDGE EXPRESSLY RELIED UPON THOSE ASSERTIONS IN REACHING HIS VERDICT OF GUILTY.

The trial Court, in his opinion at the close of State referred to his prior evaluation of the testimony of State witnesses Peck, Wernke and Jones (A. 365). He had characterized Peck's testimony as "suspect for perjury," and "singularly consistent in its evasiveness." (A. 329-330) Wernke, said the Court, "had reason to color his testimony and do what he could to join Peck in hanging the albatross around Kroll's neck." (A. 330) Jones was described as "a quiet tool," and "sort of a monkey who saw evil and heard evil but spoke no evil until subpoenaed." (A. 330, 331)

At the close of all the evidence, the Court said he "must now evaluate the witness Harris, to determine whether any bias, interest or influence affected his testimony. If it did not, thus requiring the Court to accept his unrebutted direct examination and untarnished proof, *the State's case would fall.*" (A. 366) (*Supra*, p. 17) (Emphasis added.)

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The Court then went on to find he could not place his complete reliance on Harris' credibility: "The Court finds Harris is not the disinterested witness he presents himself to be." (A. 366)

The reasons for that determinate finding and the Court's ultimate judgment are not in the evidence in this case. Rather, they flow from comments of the prosecutors and impermissible inferences by the Court.

The Court, in his opinion, found five "reasons" for doubting Harris' credibility and finding Kroll guilty of conspiracy. Each can be separated into two categories: finding and fact.

Finding one: For several years, until a few days before the trial began, Harris lived in a Florida house owned by Mrs. Mark Kroll. Rent for that house was paid by North American Underwriters (A. 366). (*Supra*, p. 17)

The fact: The trial began Oct. 30, 1967. Harris moved out of the Pine Road house in April or May of 1967 (A. 357). He paid rent to Calico Farms, but he did not know who owned the Farms (A. 344).

It was Peck who told him the home was available, and it was Peck who told him what the monthly rental would be. That was in the early spring of 1963. Peck did not tell him he was acting in Kroll's behalf. (A. 346)

The prosecutor asked: "If Mr. Kroll were to state that he or his wife owned Calico Farms, would that be a true statement?" The question was objected to and no answer was required (A. 346). Harris' former wife lived in the house at the time of trial (A. 347). NAU made the rental payments until it went out of business (A. 347).

One of the prosecutors, responding to an objection, supplied the gap in the State's evidence. He told the Court

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he intended to prove Harris "lived in Mr. Kroll's house in Miami, that he paid Mr. Kroll the monthly rent, paid it at one time out of the funds of North American Underwriters, subsequently out of the funds of another insurance company he became associated with . . ." (A. 345-346) Other than payment of rent to Calico Farms by NAU, there was no such evidence.

Finding two: During the years between the folding of Oxford General and the beginning of this trial Harris was president of American Equity Underwriters. It was developed during cross-examination that Harris, through his firm, paid or caused to be paid $22,500 to an attorney named David Walters. At about the same time, Kroll was a defendant in a Florida trial in which attorney Osman represented the plaintiff, presumably the Government, and Kroll was represented in that proceeding by attorney Walters (A. 366). Because of these "facts" the Court felt "free to conclude . . . that a relationship did in fact exist between Kroll and Harris." (A. 366) (*Supra*, pp. 17-18)

The fact: There is no evidence that Harris, personally or through any firm, paid any amount of money for any Kroll bill, legal or otherwise. There is no evidence in this record that Kroll ever was represented by an attorney named David Walters. There is no evidence Kroll was a defendant in a Florida trial in which Osman represented the Government or anyone else.

The defendant's Abstract in the Appellate Court sets out the cross-examination of Harris beginning at page 344 and ending at page 357. It covers the Report of Proceedings from pages 4785 to 4984. The examination of Michael J. Osman covers pages 358 to 361 in the Abstract and pages 4994 to 5033 in the Report of Proceedings. Nowhere on those pages does there exist any of the "facts" to which the Court referred.

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The ingredients for the Court's findings are found in statements made by the prosecutors, often in response to defense counsel's objections to inappropriate questions. (A. 345-346, 352-353, 354, 359, 360, 361)

Harris testified that from May of 1963 until the trial he had never paid or caused to be paid any bills for Kroll, legal or otherwise (A. 354). The prosecutors said they were going to prove he did, but no such proof was forthcoming (A. 353-354, 361).

When the prosecution sought to offer People's Exhibits C, D, and E, checks they said went from American Equity Underwriters to David Walters, the Court refused to admit them (A. 361). Harris never was asked the purpose or reason for those checks. He merely was asked about the signature on them, that of his former wife (A. 355).

The only question Harris was asked about attorney Walters was whether a person by that name was an attorney in Miami. Harris said he was (A. 355).

Osman's testimony was brief. He had been an attorney for about five years. He knew Mark Kroll, meeting him in November of 1966. He met Kroll at the U.S. Courthouse in Miami. He knew David Walters, an attorney who belonged to a law firm in December of 1966. And, finally, Osman examined People's Exhibits C, D, and E. That was his entire sworn testimony (A. 358-361).

It was one of the prosecutors who said Osman is "a United States Attorney. . . ." (A. 358) The Court had asked him if his next witness were a lawyer.

It was the same prosecutor who said Kroll was involved "in a certain cause of action pending in the United States District Court in Dade County, Florida." (A. 359)

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It was the prosecutors who said David Walters represented Kroll in the defense of a cause of action in the Florida court in 1966 and 1967 (A. 360-361).

And it was also the prosecutors who said that during that time certain checks went from American Equity Underwriters, Harris' firm, to attorney Walters (A. 361).

All questions dealing with whether David Walters represented Kroll were objected to and those objections were sustained (A. 359, 360).

Thus, the Court's finding, crucial to his verdict, that Harris held some relationship with Kroll, was not based on the evidence, but on the unsworn, unreliable comments of the prosecution.

Finding three: Certain checks went from North American Underwriters to Kroll's Wilmark Insurance Agency after the date Harris was instructed by Peck to have nothing further to do with Kroll (*Supra*, p. 18) (A. 366)

The fact: The Court apparently was referring to People's Exhibits F through L. These were checks from NAU to Wilmark in November and December of 1963. But they were issued and signed by William Jones. Harris never was asked if he knew anything about the checks or if he had ever seen them before.

His only testimony about these checks was that seeing them did not refresh his recollection of the exact date Peck offered him "a piece of the action" (A. 356). They were admitted into evidence over the objection of the defense (A. 362).

Finding four: While Harris was not subpoenaed by the defense, the State found him to be a difficult witness, at best, for locating. It appears that Harris was even at-

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tempting to evade process and that, in fact, some kind of contempt proceedings had been planned by Florida authorities (A. 367). (*Supra*, p. 18)

The fact: There is no evidence whatever to support that finding. It is based solely on the comments of the prosecution. The subject arose when the defense objected to the State's motion, made in the presence of the witness, that Harris "be sequestered by the Sheriff of Cook County" and not allowed to communicate with the defendant or his representatives (A. 342).

When the defense objected, saying the motion was calculated to coerce the witness, one of the prosecutors went into a discourse on a journey to Florida by fellow prosecutor John Gertie. He said it "was the opinion of law enforcement people" that Harris was evading subpoenas. He also said that a Florida prosecutor "informed our office that they were going into court . . . to hold Mr. Harris in contempt for failure to produce corporate books and records pursuant to a subpoena duces tecum . . . And he was sequestering himself. We couldn't find him." (A. 343)

That comment brought a motion for mistrial (A. 343). Harris had testified on direct examination he was served a subpoena by the State of Illinois in this case in November or December of 1967, "but no one from the State's Attorney's Office ever interviewed me." (A. 336)

That was the only evidence on the subject of Harris' availability. The State never attempted to introduce proper testimony to contradict him. Instead, the State was content to insinuate its points through the prosecutor's comments, unsworn and based on what he had heard from others. The technique was successful. The comments about Harris played a role in forming the Court's final decision.

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Finding five: The only person who could have testified for the defense about the overt acts alleged in the conspiracy counts "has been in this courtroom since the trial began. Despite the fact that the court has reason to conclude that he is a courtroom veteran, he did take the stand." (A. 367) (*Supra*, p. 18)

The fact: The Court only could have been referring to Mark Kroll as the "one who did not take the stand." The impression that Kroll was a courtroom veteran did not come from trial testimony. It could only have been based on the prosecution's repeated and successful efforts to show the Court Kroll was a defendant in a Florida action brought against him by the Government. These are detailed in the facts set out after *Finding Two* in this part of the Argument.

In this case, the defense was able to confront and cross-examine witnesses called to the witness stand under oath. But it was not that testimony that convicted Mark Kroll.

The trial judge's findings are the foundation for his guilty verdict. He gave the reasons detailed in this argument as the *sine qua non* of his judgment.

Yet, no witness testified Thomas Harris lived in a Florida house owned by Mrs. Mark Kroll until a few days before trial. No witness testified Harris paid any of Kroll's bills, legal or otherwise. No witness said Harris knew anything about any checks going from NAU to Wilmark after being told by Peck to stay away from Kroll. And no witness testified Harris was evading process or facing contempt proceedings in Florida.

Each of these findings was based on something said by a prosecutor. The defense repeatedly sought to call atten-

tion to the impropriety of the comments. All motions for mistrial were denied.

Despite the trial judge's own clear expression that he relied upon these factual assertions not in evidence in determining that defense witness Harris was not to be believed, and that therefore the State's testimony established Petitioner's guilt, the Appellate Court reached the following startling conclusion:

> "Therefore, even if the trial judge erred in stating his reasons for finding Harris a biased witness, this error had no significance and did not result in prejudice to the defendant." (App. A, p. 7, *infra*)

Petitioner earnestly submits that the trial Court erred not in stating his reasons, but in utilizing those reasons in reaching his judgment, based as they were upon matters not in evidence.

Petitioner further submits that the holding of the Appellate Court conflicts seriously and dangerously with the decisions of this Court establishing the right of a criminal defendant in federal or state court[7] to have his guilt or innocence determined upon competent evidence in the record. *Garner* v. *Louisiana,* 368 U.S. 157, 174-175, 7 L.Ed.2d 207, 82 S. Ct. 248 (1961).

This court has held the Sixth Amendment to require that "the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of con-

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[7] This Court has held that ". . . 'the right of an accused to be confronted with the witnesses against him must be determined by the same standards whether the right is denied in a federal or state proceeding . . .' 380 U.S., at 407-408, 13 L ed 2d 928." *Smith* v. *Illinois,* 390 U.S. 129, 133, 19 L Ed. 2d 956, 88 S.Ct. 748 (1968).

frontation, of cross-examination, and of counsel." *Parker* v. *Gladden,* 385 U.S. 363, 364, 17 L.Ed. 2d 420, 87 S.Ct. 468 (1966); *Turner* v. *Louisiana,* 379 U.S. 466, 472-473, 13 L.Ed. 2d 424, 85 S.Ct. 546 (1965); *Pointer* v. *Texas,* 380 U.S. 400, 405, 13 L.Ed.2d 923, 85 S.Ct. 1065 (1965). Assertions of material fact made by a prosecutor to the trier of fact which are not based upon competent evidence deprive a defendant of his rights of confrontation and a fair trial. *Douglas* v. *Alabama,* 380 U.S. 415, 419, 13 L.Ed.2d 934, 85 S.Ct. 1074 (1965).

In terms particularly applicable here, this Court pointed out that ". . . one of the important objects of the right of confrontation was to guarantee that the fact finder had an adequate opportunity to assess the credibility of witnesses [citation omitted]" *Berger* v. *California,* 393 U.S. 314, 315, 21 L.Ed. 2d 508, 89 S.Ct. 540 (1969).

For this trial judge the case turned upon the credibility of three prosecution witnesses and the one defense witness. (*Supra,* p. 17) It was upon that pivotal issue that assertions not in evidence were allowed to determine the verdict.

The constitutional right of confrontation and cross-examination so highly regarded in the matrix of constitutional guarantees by this Court, *Pointer* v. *Texas,* 380 U.S. 400, 403-405, 13 L.Ed.2d 923, 85 S.Ct. 1065 (1965), and which "[t]his Court has been zealous to protect . . . from erosion", *Green* v. *McElroy,* 360 U.S. 474, 496-497, 3 L.Ed 2d 1377, 79 S.Ct. 1400 (1959), must not now be allowed by this Court to be emasculated in Illinois, as has been done by the Appellate Court's treatment of this case.

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II.

PETITIONER'S PRIVILEGE AGAINST SELF-INCRIMINATION WAS VIOLATED AND HE WAS DENIED DUE PROCESS OF LAW WHEN THE PROSECUTORS REPEATEDLY COMMENTED TO THE TRIAL JUDGE SITTING AS THE TRIER OF FACT REGARDING PETITIONER'S FAILURE TO TESTIFY; HE WAS FURTHER DEPRIVED OF THE SAME RIGHTS WHEN THE TRIAL JUDGE EXPRESSLY CONSIDERED PETITIONER'S FAILURE TO TESTIFY IN REACHING HIS VERDICT OF GUILTY.

Petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, was violated at trial when the prosecutors succeeded in bringing Petitioner's failure to testify into the trial Court's determination of guilt.

At the time defense testimony began, the prosecution knew Mark Kroll previously had been convicted of a felony in a United States District Court in Florida (A. 368). That raised the distinct possibility Kroll would not testify.

Yet the State, during Thomas Harris' direct examination, made this objection to Harris' offered testimony regarding a conversation with Kroll: "If the defendant wants to take the stand and testify to it that is another thing." The defense promptly moved for a mistrial (A. 339).

When the mistrial motion again was made, the prosecutor said: "It is self-serving and if the defendant wants to take the stand and testify to it, that's another thing and we can cross-examine him." (A. 343)

And during cross-examination of Harris, the prosecutor asked "If Mr. Kroll were to state that he or his wife owned Calico Farms, would that be a true statement?" (A. 346)

The purport of these remarks was to deprive Kroll of the protection accorded by the right to remain silent.

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This Court struck down in *Griffin* v. *California*, 380 U.S. 609, 14 L.E.2d 106, 85 S.Ct. 1229 (1965), the state practice of allowing adverse comments by prosecutors and judges on a defendant's choice not to testify in his own behalf.

While reserving the question of whether a state court defendant has a constitutional right to a jury instruction that his silence is to be disregarded, *Griffin* v. *California*, 380 U.S. 609, 615, n.6, the Court held that the spirit of the Fifth Amendment "declares that the [defendant's silence] shall not create any presumption against him." *Id.* at 613-614. The Court declared that one asserting the privilege ought not to suffer a "penalty . . . for exercising a constitutional privilege." *Id.*

The trial Court here inflicted the ultimate penalty upon Petitioner: he considered Petitioner's failure to testify in reaching his determination of the facts and his verdict.

Noting that defense witness Harris did not testify to the overt acts alleged in the conspiracy counts, the trial judge said:

> "The only person who could have testified about those transactions for the defense has been in this courtroom since the trial began. Despite the fact that the Court has reason to conclude that he is a courtroom veteran, he did not take the stand. This was his choice, and the Court, of course, does not hold it against him (A. 367)." (*Supra*, p. 18)

That the Court really did "hold it against him" is made plain in the final paragraph of his opinion:

> "The evidence of bias and interest on the part of Harris *plus the defense's failure to present denial testimony, which only it could offer*, leads this Court to the conclusion that it must resolve the issues in this case in favor of the prosecution." (A. 368) (*Supra*, p. 19) (Emphasis added.)

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The judgment of guilty was explicitly based in part on Kroll's failure to testify. It had been nurtured by improper comments of the prosecutors. The effect was a grave violation of Kroll's constitutional right to remain silent.

The Appellate Court dismisses the trial Court's use of Kroll's failure to testify by equating it with a prosecutor's right to comment in argument on the uncontradicted nature of the State's evidence. "We discern no prejudicial effect from the court making a similar comment." (App. A, p. 9, *infra*)

The issue, of course, is not whether the *comment* prejudices the defendant, but rather: (1) whether the comment indicates that the Court considered "the defense's failure to present denial testimony, which only it could offer" (*i.e.* Kroll's exercise of his privilege against self-incrimination) in deciding the case, and (2) if so, whether such consideration violated Kroll's constitutional privilege and deprived him of a fair trial.

The plain words of the Court's concluding paragraph answer the first question in the affirmative. How much more clearly could it have been said? The decisions of this Court require a similar answer to the second question.

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III.

PETITIONER WAS DENIED HIS RIGHTS OF CONFRONTATION AND DUE PROCESS OF LAW WHEN THE PROSECUTION DEPRIVED HIM OF FAIR CROSS-EXAMINATION AT TRIAL BY SELECTIVELY EXCLUDING THE COURT REPORTER FROM THE GRAND JURY ROOM DURING THE TESTIMONY OF CRUCIAL PROSECUTION WITNESSES

The Illinois Appellate Court has sanctioned a deliberate deprivation by the prosecution of Petitioner's right to confrontation through full and effective cross-examination at trial. That sanction was delivered by the Appellate Court's equating the State's actions here with the rule in Illinois that due process of law does not require that grand jury testimony be recorded,[8] and that if recorded but not transcribed, the State need not have it transcribed and furnished to a defendant at trial.[9]

The refusal of the Illinois courts to place that financial and administrative burden upon the State in all grand jury proceedings is vastly different from the deliberate picking and choosing which occurred here.[10]

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[8] *People* v. *Colletti*, 101 Ill. App. 2d 51, 242 N.E.2d 63 (1968), *cert. denied*, 396 U.S. 927; *People* v. *Derengowski*, 67 Ill. App. 2d 66, 213 N.E.2d 618 (1966).

[9] *People* v. *Aughinbaugh*, 36 Ill. 2d 320, 223 N.E.2d 117 (1967).

[10] One U.S. Circuit Court of Appeal in examining a nearly identical prosecution tactic remarked:

> • • • it is evident that the Government so arranged matters that there would be available transcripts by which neutral witnesses could be held to their Grand Jury testimony and checked if they varied from it, while as to government partisan witnesses,

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In all, twenty-five witnesses appeared before the grand jury. The testimony of fourteen was transcribed. No court reporter was present when three assistant state's attorneys and six court reporters testified. And no court reporter was in attendance when two other witnesses testified. These were Raymond J. Wernke and William L. Jones (A. 326).

Thus, two of the three "key" State witnesses were able to testify without concern that their grand jury testimony could be used against them during cross-examination. The third witness, Harold Peck, had refused to testify before the grand jury (A. 149).

The decision to send the court reporter out of the grand jury room when Wernke and Jones testified was calculated and deliberate. Only court reporters and prosecutors joined them in the comfort of testifying without the inconvenience of a permanent record.

There was a reporter for Petitioner's grand jury appearance (A. 325).

Six court reporters were employed by the State's Attorney's office at the time Wernke and Jones appeared before the grand jury. (A. 325).

The practice utilized against Petitioner and sanctioned by the Appellate Court is a serious violation of Petitioner's Sixth Amendment right to be confronted by witnesses against him, and it sharply departs from this Court's decisions interpreting and implementing that right.

(Footnote Continued)

who presented no danger of their being swayed from their recitals, there would be no writing which the taxpayer might use for cross examination. It was a clever scheme, but one-sided and unfair • • • *Lenske* v. *United States*, 383 F.2d 20, 24-25 (9th Cir. 1967).

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In holding the Sixth Amendment confrontation clause applicable to the States, this Court said:

> "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's goal." *Pointer* v. *Texas*, 380 U.S. 400, 405, 85 S.Ct. 1065, 1068 (1965).

Confrontation does not merely mean physically confronting one's accuser in court. This Court has recognized that it constitutes the heart of the adversary fact-finding process upon which we depend so heavily to ferret out the truth in a criminal trial.

In *Berger* v. *California*, 393 U.S. 314, 21 L.Ed.2d 508, 89 S.Ct. 540 (1969), this Court reemphasized:

> "As we pointed out in *Barber* v. *Page* [390 U.S. 719 (1968)], one of the important objects of the right of confrontation was to guarantee that the fact-finder had an adequate opportunity to assess the credibility of witnesses."

The State succeeded here in insulating the three men whom the trial judge described as "three theme witnesses. . . . [w]ithout [whom] the State has nothing" (A. 329), by depriving Petitioner of one of the truest means of testing a witness' credibility at trial.[11]

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[11] This Court recognized the importance to the fact-finding process of the availability to a criminal defendant of prior statements by prosecution witnesses in *Jencks* v. *United States*, 353 U.S. 657, 667: "Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory."

In considering a related issue—that of production of witnesses' pre-trial statements—this Court quoted approvingly from the opinion of Judge Cooley of the Michigan Supreme Court:

> "The State has no interest in interposing any obstacle to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony of untrustworthy persons." *Gordon* v. *U. S.*, 344 U.S. 417, 419, 97 L.Ed. 447, 73 S.Ct. 369 (1952).

The trial Court here found Raymond Wernke and William Jones to be just such persons.

"This Court has been zealous to protect [the rights of confrontation and cross-examination] from erosion", *Greene* v. *McElroy*, 360 U.S. 474, 496-497, 3 L.Ed.2d 1377, 79 S.Ct. 1400 (1959), and it should not ignore the serious kind of erosion in which the State of Illinois has succeeded here.

CONCLUSION

Wherefore, for the foregoing reasons the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

OPINION OF THE APPELLATE COURT

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

MARK KROLL,

Defendant-Appellant.

Gen. No. 53639

Appellate Court of Illinois,
First District, Fifth Division.

Feb. 25, 1972.

Rehearing Denied March 28, 1972.

Mr. Justice Drucker delivered the opinion of the court:

Defendant appeals from the conviction for conspiracy to commit theft for which he was sentenced to a term of one to three years. He was tried without a jury.

On Appeal defendant contends (1) that the judge based his findings on matters not in evidence thus depriving defendant of his rights to confrontation and due process of

law (2) that defendant's right to remain silent was violated by improper remarks of the prosecution and evidenced by the oral opinion of the trial judge; (3) that the court erred when it failed to strike the direct testimony of two state witnesses upon defendant's motion, after defendant learned that their grand jury testimony had not been recorded; (4) that the court erred in failing to order the production of the grand jury testimony of two persons who did not testify at trial; and (5) that defendant was not proven guilty beyond a reasonable doubt.

The record in this case is voluminous; over 5000 pages of testimony were recorded and hundreds of exhibits were introduced. Defendant was tried on 24 counts of theft and three counts of conspiracy to commit theft. At the end of the State's case in chief, the 24 substantive counts were dismissed; the court denied defendant's motion to dismiss the remaining conspiracy counts. At the close of all the evidence, the court found defendant guilty of the conspiracy.

Both parties agree that the State's case lay essentially in the testimony of three witnesses, Raymond Wernke, William Jones and Harold Peck[1] and the extensive documentation inferentially supporting the conspiracy theory. The defense relied on an extensive cross-examination of the three State witnesses and the testimony of its only witness, Thomas Harris.

The State's theory of the case is that the defendant, through the use of a web of corporate entities, was the instrumental figure in draining a substantial amount of funds from Oxford General Insurance Company, an Illinois corporation. Defendant was not an officer of Oxford Gener-

[1] Peck was indicted along with defendant but a motion for severance was granted.

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al. He was not authorized to sign checks on its behalf, nor did he in fact do so. Rather, he directed this draining process indirectly, through the figures of Raymond Wernke, Harold Peck and William Jones.

The defense's theory of the case is that the defendant was simply not connected to the process by which Oxford General was victimized. It contends that the three key State witnesses were the real perpetrators of this crime and that they were now trying to shift the blame onto the defendant.

There were three conspiracy counts in the indictment differing from each other only with respect to the location where the alleged agreement to commit theft and acts pursuant thereto took place. They each stated that defendant and Harold Peck committed the offense of conspiracy in that they:

> [w]ith intent that the offense of theft of property, money, funds, bank credits, bank deposits, checks * * * and securities, of a value of more than one hundred fifty dollars, the property of that certain aforesaid mutual insurance company duly organized, incorporated and existing under and pursuant to the terms of the Illinois Insurance Code and having the names, successively, of Columbia General Mutual Casualty and Oxford General Mutual Insurance Company, be committed, agreed with each other to the commission of that offense, and in furtherance of said conspiracy they committed certain acts, including, but without limitation to, the following: [The first three overt acts are omitted.]
>
> (4) On or about March 13, 1963, Mark Kroll and Harold Peck, and each of them, caused and directed the transfer, by means of a check and order for the Payment of money, of money, funds and credits, in the amount and of the value of $55,000.00, the property of said mutual insurance company, on deposit at the

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American National Bank and Trust Company of Chicago, in said County, to the Central Trust Company, a banking institution in Cincinnati, Ohio.

(5) On or about May 21, 1963, Mark Kroll and Harold Peck, and each of them, caused and directed the transfer, by means of a check and order for the payment of money, of money, funds and credits, in the amount and of the value of $16,000.00, the property of said mutual insurance company, on deposit at the American National Bank and Trust Company of Chicago, in said County, to Oxford Financial Corporation, a corporation.

(6) On or about June 10, 1963, Mark Kroll and Harold Peck, and each of them, caused and directed the transfer, in said County, by means of a check and order for the payment of money, of money, funds, and credits, in the amount and of the value of $2,000.00, the property of said mutual insurance company, on deposit at the American National Bank and Trust Company of Chicago, in said County, to an individual payee located in the City of Chicago, in said County.

(7) On or about August 26, 1963, Mark Kroll and Harold Peck, and each of them, caused and directed the transfer, by means of a check and order for the payment of money, of money, funds and credits, in the amount and of the value of $750.00, the property of said mutual insurance company, on deposit at the American National Bank and Trust Company of Chicago, in said county, to said Oxford Financial Corporation.

(8) On or about August 30, 1963, Mark Kroll and Harold Peck, and each of them, caused and directed the transfer, by means of a check and order for the payment of money, of money, funds and credits, in the amount and of the value of $1,000.00, the property of said mutual insurance company, on deposit at the American National Bank and Trust Company of Chicago, in said County, to Agency Management Corporation, a corporation.

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(9) On or about September 27, 1963, Mark Kroll and Harold Peck and each of them, caused and directed the transfer, by means of a check and order for the payment of money, of money, funds and credits, in the amount and of the value of $11,300.00, the property of said mutual insurance company, on deposit at the American National Bank and Trust Company of Chicago, in said County, to North American Securities Company, Inc., a corporation.

Opinion

Defendant first contends that the judge based his decision on matters not in evidence thus depriving defendant of his rights to confrontation and due process of law. Specifically, defendant argues that the court concluded that the defense's only witness, Thomas Harris, was biased, and that this conclusion was based on various findings of fact which were unsubstantiated by competent evidence in the record.

We find it unnecessary to consider whether Harris was or was not a credible witness since the trial court found that Harris "did not and could not testify to any of the overt acts alleged in the conspiracy counts, in Paragraphs Number 4 through 9, * * *." We might also add that Harris did not and could not testify as to either the many business office meetings at which the agreement to commit theft was arrived at or the extensive documentation inferentially supporting the conspiracy theory since he was in Florida operating North American Underwriters, a Florida based insurance company, and the victimization of Oxford General took place essentially in Chicago and Cincinnati, the latter city being the location of the corporate offices of Oxford General and the other corporate entities involved.

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Since proof of only one overt act in carrying out the conspiracy is necessary to support the conviction,[2] we will specifically analyze paragraph six of each conspiracy count. It in substance alleges that the defendant and/or Harold Peck caused $2000 to be transferred by check from Oxford General's bank account to "an individual payee in Chicago." At the trial the named payee, a prominent Chicago based attorney, testified that a company owned by the defendant (Twentieth Century Underwriters) had incurred a tax liability which could be settled for $2000. The three State's witnesses all corroborated the fact that the defendant owed a tax assessment and that this particular Chicago attorney was representing him in the matter. Jones stated that on June 10, 1963, acting on the defendant's instructions, he issued a check from Oxford General payable to the named attorney; said check was admitted into evidence as People's Exhibit 15. The attorney testified that he had never performed legal services on behalf of Oxford General and that Oxford General owed him nothing. He simply accepted the check for his attorney's fees in settling the tax liability defendant had incurred in the operation of Twentieth Century Underwriters.

Five additional checks, for $200 each, were paid to this attorney out of Oxford General's funds. They were for

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[2] Section 8-2(a) of the Code of Criminal Procedure, Ill. Rev. Stat. 1965, par. 8-2(a), reads as follows:

(a) Elements of the offense.

A person commits conspiracy when, with intent that an offense be committed, he agrees with another to the commission of that offense. No person may be convicted of conspiracy to commit an offense unless *an act* in furtherance of such agreement is alleged and proved to have been committed by him or by a co-conspirator. [Emphasis supplied.]

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services rendered for the defendant concerning matters wholly unrelated to the operation of Oxford General. Peck, Wernke and Jones knew that the checks were not issued for services rendered on behalf of Oxford General but nevertheless acquiesced in defendant's instructions. Jones ultimately drew these five checks and they were admitted as People's Exhibits 13, 16, 17, 18 and 24.

As previously noted, Harris did not testify at all as to the above facts, nor as to any of the other overt acts contained in paragraphs 4 through 9 of the conspiracy counts. Therefore, even if the trial judge erred in stating his reasons for finding Harris a biased witness, this error had no significance and did not result in prejudice to the defendant.

Defendant's second contention is that his constitutional and statutory rights (Ill. Rev. Stat. 1967, ch. 38, par. 155-1) to remain silent were violated by improper remarks of the prosecution and evidenced by the opinion of the trial judge. Defendant points to the following instances where alleged improper comments were made.

During the direct examination of Thomas Harris, the defense witness, Harris was asked to relate the substance of a telephone conversation between himself and the defendant. The State objected to Harris testifying as to what the defendant said during the conversation, arguing that such testimony would be hearsay. The State's Attorney argued to the court:

> Your honor, we cannot cross examine the conversation being attempted to be put in on behalf of the Defendant, it's self-serving; if the Defendant wants to take the stand and testify to it that is another thing.

The defense moved that this remark be stricken from the record. The court denied the motion. Defendant then

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moved for a mistrial, and this motion was also denied. The court overruled the State's evidentiary objection and Harris was permitted to testify as to what the defendant said during the subject telephone conversation. Later the defense renewed its motion for a mistrial. The State reiterated the substance of its objection to Harris' testimony.

The record shows that the purpose of the prosecutor's remarks was to explain the nature of his evidentiary objection. His argument was that the admission of statements made by the defendant during the telephone conversation would be hearsay if testified to by the witness on the stand and introduced to establish the truth of the statements. The reference to the fact that only the defendant could properly testify as to what he had said during the conversation was only a further explanation of the nature of the objection. We find his comments to be proper argumentative responses, not comments purposely attracting the court's attention to the defendant's failure to testify. See *People* v. *Wood*, 306 Ill. 224, 230, 231, 137 N.E. 799; see also *People* v. *Woods*, 26 Ill. 2d 557, 562, 188 N.E.2d 1.

The other incident pointed to by the defendant also occurred during the cross-examination of Thomas Harris. The State was attempting to show that Harris lived in a home owned by the defendant. Harris was asked, "If [the defendant] were to state that he or his wife owned Calico Farms, would that be a true statement?" In a colloquy with the court, defense counsel stated:

> [This is] another oblique reference to [the defendant] testifying, [the defendant] saying. No place for this in this trial.

Defendant's objection to the question was sustained. We do not find this "oblique reference" to be prejudicial. The

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inference defendant would have us draw is too weak to conclude that the question was asked with the intent to direct the attention of the trier of fact to defendant's failure to testify. See *People* v. *Mills*, 40 Ill.2d 4, 237 N.E.2d 697.

The defendant calls attention to the court's opinion which states:

> The only person who could have testified about [the overt acts alleged in the indictment] • • • has been in this courtroom since the trial began.

However, the court added:

> Despite the fact that the court has reason to conclude that he is a courtroom veteran, he did not take the stand. *This was his choice, and the court, of course, does not hold it against him.* [Emphasis supplied.]

Defendant argues, "[t]hat the Court really did hold it against him is made plain in the final paragraph of • • • [the court's] opinion" where the court stated:

> The evidence of bias and interest on the part of Harris *plus the defense's failure to present denial testimony, which only it could offer*, leads this Court to the conclusion that it must resolve the issues in this case in favor of the prosecution. [Emphasis supplied.]

We believe that the court was merely commenting on the uncontradicted nature of the State's case. It is well settled that a prosecutor may comment on the uncontradicted nature of the State's case even where the only person who could have contradicted the State's evidence was the defendant himself. *People* v. *Mills*, 40 Ill.2d 4, 8, 237 N.E.2d 697 (1968); *People* v. *Hall*, Ill. App. First District No. 5437[illegible], ... N.E.2d ..... We discern no prejudicial effect from the court making a similar comment.

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Defendant's third contention is that the court erred when it failed to strike the direct testimony of two State witnesses (Raymond Wernke and William Jones) upon defendant's motion, after defendant learned that their grand jury testimony had not been recorded.

In all, 25 persons testified before the grand jury. The testimony of 14 persons was transcribed. No court reporter was present during the testimony of six court reporters, three Assistant State's Attorneys and two State witnesses, Raymond Wernke and William Jones. Defendant argues that the prosecution strategically "picked and chose" those persons who were to have their grand jury testimony transcribed. In his brief defendant states, "It is not unreasonable to conclude the prosecutors were making a conscious effort to insulate their prize witnesses from effective cross-examination."

The State's Attorney in a colloquy with the court stated that no "ulterior motive" was present, that it was the practice of the State's Attorney's office to transcribe only the testimony of those witnesses who it feared might prove unreliable. Also, he stated that the instant case "was handled by the Financial Crimes Section and it is not the common practice to have a court reporter present at all times on special cases."

In *People* v. *Colletti*, 101 Ill. App.2d 51, 242 N.E.2d 63, cert. den. 396 U.S. 927, this precise issue was decided adversely to the defendant. In *Colletti* the defendant made a timely motion for the production of the grand jury testimony of various witnesses. It was learned that no court reporter had been present at the grand jury proceeding. In reviewing the claim that this procedure had denied the defendants a fair trial, the appellate court accepted the defendants' assumption that the sole reason for this prac-

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tice was "to deprive [the] defendants of an opportunity to have access to grand jury testimony for impeachment purposes." The court stated at page 58:

> The basic question is whether the State has a duty to insure that the testimony of witnesses before the Grand Jury will be recorded for the later use of the defendant. It is clear that no such duty exists. People v. Aughinbaugh, 36 Ill2d 320, 324-325, 223 NE2d 117 (1967). Accordingly, it makes no difference what the motive of the State's Attorney was in not having the testimony recorded.
>
> The theory advanced by the defendants would create impossible problems of administration, * * * Every time the State called a witness whose Grand Jury testimony had not been recorded, an inquiry would have to be held as to the "motive" of the prosecutor in not having had a reporter present.

See also *People* v. *Derengowski*, 67 Ill. App.2d 66, 213 N.E.2d 618.

Defendant next contends that the court erred in failing to order the production of the grand jury testimony of two persons who did not testify at the trial. The names Leo Spivack and Robert Heffner were mentioned at various times during the trial as being business confidants of Harold Peck. Spivack was a Chicago lawyer who did work for Peck. Heffner was the president of Guaranty Financial Corporation, the corporate vehicle used to purchase Oxford General. Both men testified before the grand jury. Their testimony was transcribed. After the State presented its case in chief, defendant moved for the production of Spivack's and Heffner's grand jury testimony. This motion was denied. Defendant contends that this was error.

We believe that *People* v. *French*, 61 Ill. App.2d 439, 209 N.E.2d 505, is dispositive of this issue. In *French* the defendant, before trial, moved for the production of the grand jury testimony of a particular witness. In the motion defendant stated that this testimony was vital to his case and necessary for the proper preparation of his defense. The court granted the motion. The State's Attorney refused to produce the transcript until the particular witness testified at trial, stating that it would then be made available to the defendant for impeachment purposes. The State's Attorney was held in contempt. In reversing the contempt order the court stated at page 445:

> Here the witness whose testimony is sought, has not yet testified. He has not yet stated before the defendant and the world all that he supposedly knows about the commission of the crime in question. Until he does so testify, *no matter how vital his knowledge may appear, there can be no certainty that he will testify.* * * * *Until a witness speaks on the stand at the trial, his prior utterances before the grand jury should remain undisclosed unless he chooses, himself, to disclose what he has said, or unless there are compelling circumstances, not present in the case at bar, which may dictate, in the furtherance of justice, that a disclosure be made.* * * It is important if the grand jury is to serve its function, that these witnesses be heard. It is obvious that the guarantee, that one will not later be called upon to testify publicly, serves no purpose if the defendant can obtain this same grand jury testimony prior to trial, by merely requesting it for the purpose of preparation for trial. [Emphasis supplied.]

See *People* v. *Hall*, 83 Ill. App.2d 402, 227 N.E.2d 773; *People* v. *Allen*, Ill. Sup. No. 41441, ... N.E.2d .....

In an effort to circumvent the holding in *People* v. *French*, *supra*, defendant argues that "there was a great likelihood" that the testimony of Spivack and Heffner was

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favorable to the defendant and therefore the court should have ordered said testimony turned over to the defendant pursuant to Section 112-6(b) of the Code of Criminal Procedure, Ill. Rev. Stat. 1967, ch. 38, par. 112-6(b). This section provides in relevant part:

> Matters occurring before the Grand Jury other than the deliberations and vote of any grand juror may be disclosed when the court, preliminary to or in connection with a judicial proceeding, directs such in the interests of justice.

In essence the defendant is arguing that the State knowingly suppressed information favorable to the defendant. See *Brady* v. *Maryland*, 373 U.S. 83, 87. He does this without giving any indication that Spivack or Heffner were persons unknown or inaccessible to him. See *People* v. *Smith*, 46 Ill.2d 430, 433, 263 N.E.2d 860. It is obvious from the record that the defendant was aware of both Spivack's and Heffner's existence well before trial. In his motion for the production of grand jury testimony, made three and one-half months before the trial, defendant listed the names of Spivack and Heffner. The names and addresses of both men were on the list of potential State witnesses furnished by the State before trial. There was no showing that defendant made any effort to have these men testify on his behalf. Under these circumstances it cannot be said that the interests of justice required the production of their grand jury testimony. See *People* v. *Bivens*, 123 Ill.App.2d 79, 85, 259 N.E.2d 607.

Defendant's final contention is that he was not proven guilty beyond a reasonable doubt. Defendant's main argument here is that the trial court could not rationally direct a verdict for the defendant (as it did) on the substantive theft counts and then find him guilty of conspiracy to commit theft. In its reply brief defendant states that, "the dates and transactions contained in the substantive counts

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are not rationally separable from those in the three conspiracy counts." We think this argument is without merit. The substantive counts charged defendant with exerting unauthorized control over the funds of Oxford General. The conspiracy counts stated that there was an agreement between defendant and Harold Peck to exert unauthorized control over said funds and that various specific acts were performed in furtherance of that agreement. See Ill. Rev. Stat. 1965, ch. 38, par. 8-2.[3] None of these acts was performed by defendant. Rather, Harold Peck, defendant's co-conspirator, and the president of Oxford General, was the person overseeing their performance. Under these circumstances the court could rationally find that as a matter of law defendant had not committed the offense of theft (since he personally did not exert unauthorized control over the subject funds) but that he had committed the offense of conspiracy to commit theft in that he had agreed to commit said offense and that his co-conspirator, Peck, had performed acts in furtherance thereof.

The State presented credible and incriminating testimony through the figures of Raymond Wernke, William Jones and Harold Peck. Their testimony was corroborated by an extensive array of documentary evidence. The defense presented no substantial evidence to contradict the State's case. We do not find the trial court's decision so unreasonable as to require reversal. See *People* v. *Watkins*, 46 Ill.2d 273, 263 N.E.2d 115.

The decision of the circuit court is affirmed.

AFFIRMED.

Lorenz, P.J., and English, J., concur.

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[3] See Note 2, *supra*.

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APPENDIX B

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

Present The Honorable Francis S. Lorenz Presiding Judge.

Present The Honorable Robert E. English Judge.

Present The Honorable Joseph J. Drucker Judge.

Leslie V. Beck
Clerk.

Richard J. Elrod
Sheriff.

People of the State of Illinois,

Appellee,

No. 53639 vs.

Appeal from the Circuit Court of Cook County

Mark Kroll,

Appellant.

(No. 65-2531)

AFFIRMING ORDER

The judgment of the Circuit Court of Cook County is AFFIRMED.

February 25th, 1972.

CERTIFICATE

I certify that this is a copy of the order of the Appellate Court, First District.

December 1, 1972.

/s/ *Leslie V. Beck*
Clerk of Court

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APPENDIX C

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

Present The Honorable Francis S. Lorenz Presiding Judge.

Present The Honorable Robert E. English Judge.

Present The Honorable Joseph J. Drucker Judge.

Leslie V. Beck
Clerk.

Richard J. Elrod
Sheriff.

People of the State of Illinois,
Plaintiff-Appellee,

No. 53639 vs.

Mark Kroll,
Defendant-Appellant.

Appeal from the Circuit Court of Cook County
(No. 65-2531)

Petition for Rehearing denied.

Enter: March 28th, 1972

CERTIFICATE

I certify that this is a copy of the order of the Appellate Court, First District.

December 1, 1972

/s/ *Leslie V. Beck*
Clerk of Court

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APPENDIX D

UNITED STATES OF AMERICA

State of Illinois,
Supreme Court —ss.

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eighth day of May in the year of our Lord, one thousand nine hundred and seventy-two, within and for the State of Illinois.

Present: Robert C. Underwood, Chief Justice
Justice Walter V. Schaefer Justice Thomas E. Kluczynski
Justice Daniel P. Ward Justice Charles H. Davis
Justice Joseph H. Goldenhersh Justice Howard C. Ryan

William J. Scott, Attorney General

Robert G. Miley, Marshal

Attest: Justin Taft, Clerk

BE IT REMEMBERED, that, to-wit: on the 18th day of May, A.D. 1972, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

People State of Illinois,

Respondent

No. 45142 vs.

Mark Kroll,

Petitioner

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Petition for Leave to Appeal from Appellate Court

First District

53639

And now, on this day, the Court having duly considered the motion by petitioner for reconsideration of the order entered May 11, 1972, denying motion for an extension of time for filing petition for leave to appeal, and being fully advised of and concerning the premises;

IT IS HEREBY ORDERED that the motion by petitioner for reconsideration of the order entered May 11, 1972, denying motion for an extension of time for filing petition for leave to appeal be, and the same is, allowed. It is further ordered that the time for filing petition for leave to appeal be extended to and including June 1, 1972.

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APPENDIX E

State of Illinois,
Supreme Court—ss.

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eleventh day of September in the year of our Lord, one thousand nine hundred and seventy-two, within and for the State of Illinois.

Present: Robert C. Underwood, Chief Justice

Justice Walter V. Schaefer Justice Thomas E. Kluczynski

Justice Daniel P. Ward Justice Charles H. Davis

Justice Joseph H. Goldenhersh Justice Howard C. Ryan

William J. Scott, Attorney General

Robert G. Miley, Marshal

Attest: Justin Taft, Clerk

Be It Remembered, that, to-wit: on the 28th day of September 1972, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

People State of Illinois,

Respondent

No. 45142 vs.

Mark Kroll, Petitioner

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Petition for Leave to Appeal from Appellate Court

First District

53639

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.